No. 91-935

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1991

CLAYTON EUGENE DEFRIES, ET AL.,
*Petitioners,*

v.

LICENSED DIVISION, DISTRICT NO. 1-MEBA/NMU, AFL-CIO,
*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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## BRIEF IN OPPOSITION

Respondent respectfully requests that this Court deny the Petition for a Writ of Certiorari seeking to review the decision of the Court of Appeals for the Fourth Circuit entered in this case on August 26, 1991.

## STATEMENT OF THE CASE

Petitioners ask this Court to review the decision of the Court of Appeals that Respondent, Licensed Division, District No. 1 - MEBA/NMU, AFL-CIO ("Licensed Division"), and not District No. 1 -MEBA/NMU (AFL-CIO) ("District No. 1"), is the entity empowered to appoint union trustees of four union benefit funds. Respondent opposes the Petition on the ground that this case does not present the question for which Petitioners seek review.

As a preliminary matter, Petitioners' statement of the case is inaccurate, because they assume that the Court of Appeals made a finding that the Court did *not* make. Petitioners state that "[t]he Court of Appeals . . . justified *judicial preemption of the Trustees' authority* . . ." and that "the Court of Appeals held that judicial deference is not required on a matter of plan interpretation, *notwithstanding an express grant of discretion* . . . ." (Pet. at 4 and 5) (emphasis added.) Both statements at least imply that the trustees were vested with discretionary authority, but refused to heed that authority. In fact, in disposing of Petitioners' appeal, the Fourth Circuit neither expressly, nor

impliedly, found that the trustees were vested with authority under the plan, discretionary or otherwise, to make the decision at issue.

This non-existent finding is the cornerstone upon which Petitioners rest their request for review. However, the Court of Appeals indicated twice that it was not deciding whether the trustees had discretionary authority to consider the question raised below. First, in reviewing the District Court's decision, the Court of Appeals held: "*Assuming* that exhaustion of a claim such as that here made is required under any circumstances, we agree that it should not in any event apply here because of its futility." (Pet. 8a) (emphasis added.) Second, in addressing whether this Court's decision in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989), required a deferential standard of review in this case, the Court of Appeals prefaced its discussion by "[a]gain laying aside the question whether the claim made here is one required to be first administratively presented to the Trustees . . . ." (Pet. 10a n*) Thus, contrary to Petitioners' Statement of The Case, the Court of Appeals refused to find

that the plan conferred discretion on the trustees to decide the matter at issue.

Petitioners also allege facts, not relevant to the petition, which are inaccurate or incomplete, and in order to comply with Supreme Court Rule 15.1, they are identified here. First, contrary to Petitioners' assertion, District No. 1 did not "create" the Licensed Division. (Pet. at 2-3.) Rather, the Licensed Division came into existence simultaneously with District No. 1 as a result of merger. (Pet. at 3a, 16a-17a.)

Second, Petitioners state that "[a]lthough D-1 PCD was renamed in the merger, there was no amendment of the Trust Agreements' reference to its pre-merger name in defining the 'Union.'" (Pet. at 3.) This suggests District No. 1 simply is PCD under a new name. The Court of Appeals rejected that argument by Petitioners. (Pet. 14a-15a)

Third, Petitioners neglect to point out the significant changes in internal union structure and function generated by the merger, which both courts below recognized. Pursuant to the Agreement of Merger and the District No. 1 Constitution, the Licensed Division, not District No. 1, was given control over the collective

bargaining agreements formerly held by PCD. (Pet. 12a and 20a-21a.) Both the Court of Appeals and District Court held that the administration of the trusts, including the power of trustee appointment, was part of collective bargaining. *Id.* That holding is not challenged here.

Finally, Petitioners also omitted any mention of two related cases, the disposition of either one of which could result in this case being rendered moot. In *Ward v. DeFries*, Civil Action No. WN-90-822 (D. Md.), plaintiffs challenge the validity of the merger which created the Licensed Division and District No. 1. A decision that the merger was invalid could result in the restructuring or elimination of those competing union entities, and render the Fourth Circuit's decision moot. A similar challenge to the merger is pending in *Jackson v. Unlicensed Division*, Civil Action No. 88 Civ. 1682 (S.D. N.Y.), and may produce a like result.

## REASONS FOR DENYING THE WRIT

### I. THE QUESTION PRESENTED WAS NOT DECIDED BELOW.

In *Firestone* this Court held that where a question of plan interpretation arises as to whether a beneficiary is entitled to benefits and the plan's trustees have discretion to decide the matter, their decision should be reviewed under an abuse of discretion standard. 489 U.S. at 108-15. Where the trustees do not have such discretion, *de novo* review is appropriate. *Id.* This Court specifically limited its holding in *Firestone* to "actions challenging denials of benefits based on plan interpretations." *Id.* at 108. Petitioners here ask for review to extend *Firestone* by creating a blanket rule of law applying the abuse of discretion standard to all non-benefits cases brought under ERISA. The Fourth Circuit's decision below is not an appropriate vehicle to consider that question.

The question presented by Petitioners is whether the Court of Appeals erred in declining to apply the deferential abuse of discretion standard in a non-benefits case where the trust documents grant the trustees discretion in matters of

interpretation, on the ground that half of the trustees have a conflict of interest. However, the Court of Appeals never reached that question; nor did it have to. Rather, the Court assumed, without deciding, that exhaustion was required, and then, as directed by *Firestone*, it proceeded to factor the trustees' conflict of interest into its decision.[1] (Pet. at 10a-11a n*.) The Court of Appeals concluded that because Petitioners had such a "palpable conflict of interest," plenary review would be necessary even if exhaustion were required. *Id.* The Court of Appeals did not reach the question presented by Petitioners, because it never decided whether the trust agreements vested the trustees with discretion to decide the identity of the entity empowered to appoint union trustees. Instead, the Court followed the reasoning set forth in *Firestone* in reaching its conclusion, and its opinion is consistent with *Firestone*.

The Court also concluded that "if the exhaustion requirement did apply to claims such as those here in issue, it should not be

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[1] As used here "exhaustion" means administrative presentation to the trustees for decision followed by judicial review under an abuse of discretion standard unless, as here, *de novo* review is appropriate.

enforced here because of its obvious futility." (Pet. at 10a.) "[P]ursuing an administrative appeal," the Court held, "would be asking the incumbent trustees to interpret themselves out of a job." *Id.* It is well established that the pursuit of administrative remedies is not required where the exhaustion of such remedies would be an exercise in futility. *See generally, Glover v. St. Louis - San Francisco Ry. Co.*, 393 U.S. 324, 329-31 (1969) (no need to exhaust administrative remedies where it would be wholly futile to do so). The courts have recognized that futility is present in ERISA cases where the decision makers already have made up their minds. *See e.g., Dameron v. Sinai Hosp. of Baltimore*, 626 F. Supp. 1012, 1015 (D. Md. 1986), *aff'd in relevant part*, 815 F.2d 975 (4th Cir. 1987) (where plan had determined that its method of calculating benefits would not be changed, exhaustion of remedies under plan would be futile); *Berger v. Edgewater Steel Co.*, 911 F.2d 911 (3d Cir. 1990) (in light of plan's blanket policy of denying type of claim at issue, exhaustion was futile). Here, as noted by the Court of Appeals:

> [Petitioners] were all defeated as the leaders of the Licensed Division. The new leadership wanted to

> appoint the trustees, but the old leadership . . . resisted. (Pet. 4a.)

In light of Petitioners' refusal to vacate their positions as trustees, it would have been futile for the Licensed Division to ask these same individuals to issue an "interpretation" on whether their own removal as trustees was proper. Petitioners already had made up their minds.

*Firestone*, itself, demonstrates that it was unnecessary for the lower courts to reach the question presented by Petitioners. In *Firestone* this Court reaffirmed its holding in *Central States, Southeast and Southwest Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. 559, 570 (1985), that common law trust principles should inform and guide the development of ERISA law. Under these principles, no matter how broadly the discretion of a trustee is defined, it cannot be within a trustee's discretion to decide the substantive issue here, namely, who has the authority to appoint trustees. Restatement (Second) of Trusts, §108 (1959) provides:

> If a trust is created and there is no trustee or if the trustee, or one of several trustees, ceases for any reason to be trustee, a new trustee can be appointed

> (a) by a proper court; or
>
> (b) by the person, if any, who by the terms of the trust is authorized to appoint a trustee.

With specific reference to clause b of §108, comment f provides:

> f. Terms of the trust. A power to appoint trustees conferred by the terms of the trust can be exercised *only under the circumstances and in the manner provided by the terms of the trust.*
>
> Illustrations:
>
> 1. By the terms of a trust the beneficiaries are empowered to appoint a new trustee only if the original trustee refuses to accept the trust. The trustee accepts the trust and later dies. The power cannot be exercised. [Emphasis added.]

Thus, where, as here, the trust does not provide for the appointment of trustees in the event of merger, there is no power of appointment to be exercised. In such a case, recourse to a proper court of law is necessary. As Professor Scott stated in his treatise on the law of trusts:

> Even though by the terms of the trust a method of appointing trustees is provided, yet if the method fails or is not used, the court can appoint a trustee to fill a vacancy. [Footnote omitted.] Thus if the person on whom the power to appoint new trustees is conferred dies without exercising the power . . . *the court can appoint a new trustee.*

A. W. Scott and W. F. Fratcher, The Law of Trusts §108.2, p. 131 (4th ed. 1987) (emphasis added). Contrary to Petitioners' contentions, absent an express grant of authority specifically addressing determinations related to the appointment of trustees, a trustee may not determine who has the authority to appoint trustees pursuant to a general grant of authority to "interpret" the trust instrument.

## II. THIS CASE TURNS ON THE CONSTRUCTION OF DOCUMENTS OVER WHICH THE TRUSTEES HAD NO AUTHORITY.

*Firestone* was limited to actions challenging the interpretation of trust plans. *Firestone*, 489 U.S. at 108. As the Fourth Circuit recognized, however, this case turns on the construction of two documents over which the trustees had no authorization - i.e., the Agreement of Merger and the District No. 1 Constitution (Pet. at 11a-14a.):

> We confront the question of what is "the Union" because the trust agreements, which were not amended during the merger process, provide that "the Union" shall appoint trustees, and the antecedent to "the Union" in the agreements is District No. 1-Pacific Coast Division [sic], which was abolished in the merger. Consequently, *we must look to the documents effectuating the merger to determine which organization must be deemed to have*

> *assumed, for the purpose of appointing trustees, the mantle of "the Union."*

(Pet. at 11a) (emphasis added.)

The Fourth Circuit further recognized as arguable:

> [T]hat what is involved here is not contract "interpretation" at all (so as arguably to be a matter for the trustees in the first instance) but contract "construction" (which is another process not expressly given to the trustees). The distinction, one powerfully made by Professor Corbin, is between "interpreting" the meaning of contractual text, *and "construing" what the contracting parties would have intended had they anticipated something that they did not and so did not speak to at all in any contractual text. See* 3 *Corbin on Contracts* §534 (1960).

(Pet. at 11a n*) (emphasis added.) Having not "anticipated" the merger, the parties to the trust agreements did "not speak to" the issue of which new entity would succeed to the "Union's" power of trustee appointment. Resolution of that issue turned on the Agreement of Merger and District No. 1 Constitution, because they identify the new union entities and set forth their powers. The trust agreements do not. Unlike the Third Circuit in *Firestone*, the lower courts here were not called on merely to interpret the terms of a trust plan. Rather, they were called upon to construe other documents over which the trustees had

no authority. Therefore, the Court of Appeals owed no deference to the trustees' interpretation of those documents, and the decision below is neither a valid basis for explaining nor expanding upon *Firestone*.

## III. THE COURT OF APPEALS DECISION WILL NOT RESULT IN INCREASED LITIGATION.

Finally, Petitioners trumpet their apocalyptic concern that, unless reversed by this Court, the Fourth Circuit's decision will result in a flood of non-benefits cases. (Pet. at 10-12.) Their concern is not credible. The particular facts here, especially the construction of the two documents over which the trustees have no authority at all, and the expressly limited scope of the Court of Appeal's decision, resulted in a narrow ruling with limited implications for future litigation. Petitioners' argument is grounded on the false premise that "[u]nder the Fourth Circuit's approach, participants could receive a *de novo* court interpretation on [a non-benefits] question even where the trustees have discretion to interpret the plan." (Pet. at 10.) As discussed above, however, the Court of Appeals expressly declined to find whether the trustees had discretion to decide the

question at issue, and *de novo* review was based upon the unique facts presented here. Accordingly, this case does not stand for the broad rule suggested by Petitioners.

This Court previously considered and rejected a similar "flood of litigation" lament in *Firestone*, 489 U.S. at 114-15, stating that "*the threat of increased litigation is not sufficient to outweigh the reasons for the de novo standard . . . .*" *Id.* 489 U.S. at 115 (emphasis added.) The same principle applies here.

## CONCLUSION

For the foregoing reasons, Respondent asks that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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